

See Dissenting Opinion

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE ALBERT CAMARENA,

Defendant and Appellant.

E074811

(Super.Ct.No. RIF108282)

OPINION

APPEAL from the Superior Court of Riverside County. John D. Molloy, Judge.

Affirmed.

Rachel Varnell, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

Defendant and appellant, Jose Albert Camarena, filed a petition for resentencing pursuant to Penal Code section 1170.95,¹ which the court dismissed. After defendant filed a notice of appeal, this court appointed counsel to represent him. Counsel has filed a brief under the authority of *People v. Wende* (1979) 25 Cal.3d 436 and *Anders v. California* (1967) 386 U.S. 738, setting forth a statement of the facts, a statement of the case, and one potentially arguable issue: whether the court erred in dismissing defendant's petition. We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND²

On January 16, 2003, the victim left his house to buy cigarettes. The victim was shot in the chest and killed while walking down the street. Officers recovered four shotgun shell casings from the scene of the shooting, two of which were found under the victim's body. Two women, who lived in the area, told investigating officers that they had heard the shotgun blasts and saw a small white pickup truck driving away from the area. (*Salazar, supra*, E039164.)

Two days after the victim was killed, officers arrested defendant in an unrelated incident for possession of a sawed-off shotgun. Forensic examination of the shotgun shell casings recovered in connection with the shooting of the victim revealed that they

¹ All further statutory references are to the Penal Code unless otherwise noted.

² On our own motion, we take judicial notice of the record in the previous appeal of defendant's original judgment in *People v. Salazar* (Jan. 19, 2007, E039164) [nonpub. opn.] (*Salazar, supra*, E039164). (Evid. Code, § 479.) We take our recitation of the facts from the opinion in that case.

had been fired from defendant's sawed-off shotgun. When questioned by officers, defendant eventually admitted he shot the victim with the shotgun he was in possession of when arrested.³ (*Salazar, supra*, E039164.)

A jury found defendant guilty of second degree murder.⁴ The jury additionally found true special allegations that each defendant personally and intentionally discharged a firearm causing death (§ 12022.53, subd. (d)), personally and intentionally discharged a firearm (§ 12022.53, subd. (c)), and committed the crime for the benefit of and with the specific intent to promote, further, and assist any criminal conduct of a criminal street gang (§ 186.22, subd. (b)). The trial court sentenced defendant to serve 15 years to life on his conviction for second degree murder, plus a consecutive term of 25 years to life on the finding that he personally and intentionally discharged a firearm causing death. (*Salazar, supra*, E039164.)

On February 22, 2019, defendant filed a section 1170.95 petition for resentencing. The People filed a response asserting section 1170.95 was unconstitutional. Defense counsel filed a reply objecting to the court taking judicial notice of this court's opinion from defendant's appeal of the judgment.

³ Defendant's codefendant also admitted to being the shooter. (*Salazar, supra*, E039164.)

⁴ The jury found defendant's codefendant guilty of first degree murder. (*Salazar, supra*, E039164.)

At the hearing on January 31, 2020, the People argued the petition should be dismissed because defendant was the actual killer, and “there were no instructions on natural and probable consequences or felony murder given.” Defense counsel objected for the record. The court dismissed the petition because “there were no instructions on natural and probable consequences or Felony Murder Rule”⁵

II. DISCUSSION

We offered defendant an opportunity to file a personal supplemental brief, which he has not done. Pursuant to the mandate of *People v. Kelly* (2006) 40 Cal.4th 106, we have independently reviewed the record for potential error and find no arguable issues.

III. DISPOSITION

The order denying defendant’s petition for resentencing pursuant to section 1170.95 is affirmed.

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McKINSTER

J.

I concur:

RAMIREZ

P. J.

⁵ The record does not contain the jury instructions that were given during defendant’s jury trial. However, we have reviewed the record in *Salazar*, E039164. The court did not instruct the jury on felony murder or the natural and probable consequences doctrine.

[*P. v. Camarena*, E074811]

MENETREZ, J., Dissenting.

The appellate review procedures under *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*) and *Anders v. California* (1967) 386 U.S. 738 (*Anders*), in which we review the record ourselves to determine whether there are any arguable issues, apply “only to a defendant’s first appeal as of right.” (*People v. Thurman* (2007) 157 Cal.App.4th 36, 45; *People v. Serrano* (2012) 211 Cal.App.4th 496, 498 (*Serrano*).) *Wende/Anders* review is highly unusual and rooted in the constitutional right to counsel, and courts have repeatedly declined to apply it in other contexts. (*Pennsylvania v. Finley* (1987) 481 U.S. 551, 554-555; *Conservatorship of Ben C.* (2007) 40 Cal.4th 529, 535; *In re Sade C.* (1996) 13 Cal.4th 952, 959; *People v. Kisling* (2015) 239 Cal.App.4th 288, 290; *People v. Dobson* (2008) 161 Cal.App.4th 1422, 1425; *People v. Taylor* (2008) 160 Cal.App.4th 304, 307-308; *Glen C. v. Superior Court* (2000) 78 Cal.App.4th 570; 579.) Because this appeal concerns a postjudgment proceeding in which there is no constitutional right to counsel, appellant has no right to *Wende/Anders* review. Because appellant’s counsel filed an opening brief raising no issues, and appellant was notified but did not file a supplemental brief, we should not affirm but rather should dismiss the appeal as abandoned. (*Serrano*, 211 Cal.App.4th at pp. 503-504.) I therefore respectfully dissent.

MENETREZ

J.